BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JAMES MELVIN DECKER Claimant	)	
VS.	)	
SOUTHWIND DRILLING, INC. Respondent	)	Docket No. 1,064,078
AND	)	
TRAVELERS INDEMNITY CO. OF AMERICA Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the April 24, 2013, Preliminary Hearing Order entered by Administrative Law Judge (ALJ) Bruce E. Moore. Mitchell W. Rice, of Hutchinson, Kansas, appeared for claimant. Jeffrey E. King, of Salina, Kansas, appeared for respondent and its insurance carrier (respondent).

The ALJ found that the results of the chemical testing of claimant's urine sample were admissible to prove impairment under K.S.A. 2012 Supp. 44-501(b)(2)(A). Further, the ALJ held that K.S.A. 2012 Supp. 44-501(b)(3) was not applicable because the test sample was not collected by the employer. The ALJ also found that claimant's objections to the qualifications of Ms. Espinosa and the chain of custody of the test sample were without merit. The ALJ found the chemical testing of claimant's urine showed claimant was impaired by marijuana and methamphetamine at the time of his accident and denied claimant's request for preliminary workers compensation benefits.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the March 19, 2013, Preliminary Hearing and the exhibits; the deposition of Merrill Espinosa taken April 1, 2013, and the exhibits; the deposition of Daryle Duane Nielsen taken April 3, 2013, and the exhibits; the deposition of Stephanie Davis taken April 4, 2013; and the deposition of Mark Wuest taken April 4, 2013, and the exhibit; together with the pleadings contained in the administrative file.

ISSUES

Claimant requests review of whether the ALJ erred in allowing drug testing evidence contrary to K.S.A. 2012 Supp. 44-501(b)(3). Claimant did not file a brief in this appeal.

Respondent asks that the Preliminary Hearing Order be affirmed as the testing complied with K.S.A. 2012 Supp. 44-501(b)(2)(A). Respondent contends the ALJ correctly held that the requirements of K.S.A. 2012 Supp. 44-501(b)(3) were only applicable if the test sample was collected by the employer, and, in any event, in this case the requirements of 44-501(b)(3) were met as a split sample was taken and retained by the laboratory.

The issue for the Board's review is: Did the ALJ err in allowing the drug testing evidence as part of the record?

FINDINGS OF FACT

Claimant was employed by respondent as a backup hand on an oilfield drilling rig. At about 5:30 p.m. on January 5, 2013, claimant was descending the stairs on the rig when he slipped on icy steps and fell. Claimant tried to catch himself with his left arm by grabbing the railing, which resulted in his left shoulder being dislocated. Claimant reported his injury to his immediate supervisor, Derek Marley. Mr. Marley contacted the tool pusher, Jay Krier, who transported claimant to the Clara Barton hospital emergency room.

Claimant has worked for respondent off and on for five years and was familiar with its policies. At the time of the accident, respondent had a written policy "prohibiting the possession and/or use of illegal and unauthorized drugs, controlled substances, and alcohol in its workplaces, as well as commuting to and from [the] location of the rig."[1]

Respondent's policies included a drug testing component requiring pre-employment drug testing and drug testing upon demand. A poster on the wall in the well's "dog house" advised employees of respondent's "Accident Policy & Procedures," which required all employees to submit to a drug test "immediately following [an] accident."[2] Claimant was aware that he would be required to give a urine sample for drug testing purposes if he was involved in a work-related accident. On the way to the emergency room, claimant told Mr. Krier that his drug screen would come back "dirty."[3]

Claimant and Mr. Krier were met at Clara Barton Hospital by Daryle Nielsen, respondent's Safety Coordinator. Mr. Nielsen was known to hospital staff and provided

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[1] Nielsen Depo., Ex. 1 at 1.

[2] Nielsen Depo., Ex. 2.

[3] P.H. Trans. at 30.

staff with drug testing kits manufactured and supplied by Quest Diagnostics (Quest). Hospital staff anticipated that if one of respondent's employees presented with a work-related injury, a urine drug sample would be collected using one of the Quest kits on hand. Mr. Nielsen would then replace the kit used for testing with a new kit.

The Quest drug testing kit came in a box that contained a chain of custody form, a urine sample cup, two smaller vials, a sample bag with two pockets, two Fed Ex bags, and address labels for one of the Fed Ex bags. The urine collection cup and the two smaller vials are all sealed when received, and the seals must be broken before the urine sample can be collected.

A urine drug sample was collected from claimant at approximately 7 p.m. by Merrill Espinosa, a certified Medical Laboratory Scientist employed by Clara Barton Hospital. Ms. Espinosa works under the direction of Dr. Yarmer, a pathologist licensed in the state of Kansas. The sample was collected using a Quest test kit previously supplied by Mr. Nielsen. Ms. Espinosa, in addition to her training as a Medical Laboratory Scientist, has received training in collecting urine and blood samples through the Department of Transportation.

Claimant identified himself to Ms. Espinosa as "James Melvin Decker." He did not have a driver's license with him but gave his social security number. Mr. Nielsen also confirmed claimant's identity to the hospital staff.

After opening the Quest testing kit, Ms. Espinosa entered claimant's name and social security number onto the chain of custody form and checked a box indicating the sample was being collected "post-accident" at Clara Barton Hospital. The seal on the top of the collection cup was broken and the cup provided to claimant, who then went into a bathroom to collect the sample.

The bathroom used to collect samples is in a secure area of the laboratory. When a sample is to be collected, the water is turned off in the bathroom to prevent tap water from being placed in the collection cup, and dye is placed in the toilet so the toilet water is not placed in the collection cup. There is a temperature-sensing strip on the side of the collection cup. When claimant left the bathroom, he gave the cup containing his urine to Ms. Espinosa, who checked the temperature-sensing strip to make sure the sample was at body temperature. After breaking the seals on the two smaller vials, Ms. Espinosa poured the urine from the collection cup into the smaller vials for a "split sample."

At the bottom of the chain of custody form are seals that are stripped from the form and applied over the tops of each of the two smaller vials. The seals were dated and initialed by both Ms. Espinosa and claimant. Claimant then signed the chain of custody form, acknowledging that the samples had been sealed in his presence. The chain of custody form has several copies. The original form accompanies the urine sample.

Additional copies go to the hospital laboratory, a medical review officer, the employer and the patient.

The sealed vials containing claimant's urine sample were placed in one pocket of the sample bag, and the completed paperwork, with the chain of custody form, was placed in the other pocket. The pockets were closed, and a seal was placed over the pockets to prevent tampering. The sealed bag containing the vials and the chain of custody forms was then placed into the original box that contained the testing kit. The box was placed inside a FedEx bag and sealed inside another FedEx bag, to which the address labels were affixed. The sealed FedEx bag was then placed into a laboratory refrigerator until the parcel was picked up by FedEx for transportation to the Quest laboratory in Lenexa, Kansas, for testing. The parcel was picked up by FedEx on January 6, 2013. Respondent never had custody or control of the sample after it was collected by Ms. Espinosa.

FedEx delivered the parcel containing claimant's urine samples to the Quest laboratory on January 8, 2013. The Quest laboratory is certified by the United States Department of Health and Human Services. Stephanie Davis, a specimen technician for Quest, opened the FedEx package, examined the two-pocket bag inside, and confirmed that the seals on the pockets were intact. She then cut open the pocket containing the chain of custody form and confirmed it was complete and in order. She opened the sample pocket and visually examined the vials to confirm that the requisition number on the vials matched the number on the chain of custody form, the seals on the vials were intact, and the urine was not discolored. She then signed the chain of custody form acknowledging receipt of the sealed containers and entered the information on the packet into the Quest computer system. From there, the Quest computer generated an accession number for the sample. The accession number, rather than claimant's name or social security number, was used to identify and track the sample's progress through the Quest laboratory.

After Ms. Davis entered the information into the Quest computer and the accession number was assigned, she placed the sample, still sealed, into temporary storage, where it remained until the operator of the CV1,000 testing machine took custody of the samples and ran them through the machine to prepare for testing. The CV1,000 machine broke the seal on the test vials and removed the samples with an aliquotter for testing. The CV1,000 machine operator then placed those aliquots into temporary storage, relinquishing custody of the samples. The aliquots were later removed from temporary storage by a screening technologist, who placed them into racks for loading into a testing instrument, an Olympus No. 10. Each rack of samples tested in the Olympus No. 10 instrument contained positive and negative control samples, as well as a blind control sample, to ensure the instrument was operating correctly. Each aliquot containing samples of claimant's urine bore his accession number.

The Olympus No. 10 testing on claimant's samples was positive for marijuana and methamphetamine. The samples were then transferred for confirmation of the positive

result by gas chromatography/ mass spectrometry (GCMS). GCMS testing confirmed that claimant's urine contained 2,584 nanograms of marijuana metabolite per milliliter,[4] 489 nanograms of amphetamine per milliliter, and 7,880 nanograms of methamphetamine per milliliter.

PRINCIPLES OF LAW

K.S.A. 2012 Supp. 44-501, in part, states:

> (a)(1) Compensation for an injury shall be disallowed if such injury to the employee results from:
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> . . . .
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> (D) the employee's reckless violation of their employer's workplace safety rules or regulations; or
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> . . . .
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> (b)(1)(A) The employer shall not be liable under the workers compensation act where the injury, disability or death was contributed to by the employee's use or consumption of alcohol or any drugs, chemicals or any other compounds or substances, including, but not limited to, any drugs or medications which are available to the public without a prescription from a health care provider, prescription drugs or medications, any form or type of narcotic drugs, marijuana, stimulants, depressants or hallucinogens.
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> (B) In the case of drugs or medications which are available to the public without a prescription from a health care provider and prescription drugs or medications, compensation shall not be denied if the employee can show that such drugs or medications were being taken or used in therapeutic doses and there have been no prior incidences of the employee's impairment on the job as the result of the use of such drugs or medications within the previous 24 months.
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> (C) It shall be conclusively presumed that the employee was impaired due to alcohol or drugs if it is shown that, at the time of the injury, the employee had an alcohol concentration of .04 or more, or a GCMS confirmatory test by quantitative analysis showing a concentration at or above the levels shown on the following chart for the drugs of abuse listed:
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> Confirmatory test cutoff levels (ng/ml)
> Marijuana metabolite[1] 15

[4] While the court reporter who transcribed the testimony of Mark Wuest typed "nanograms . . . per millimeter," the test results themselves reflect "ng/mL," nanograms per millileter.

Cocaine metabolite[2]	150
Opiates:	
Morphine	2000
Codeine	2000
6-Acetylmorphine[4]	10 ng/ml
Phencyclidine	25
Amphetamines:	
Amphetamine	500
Methamphetamine[3]	500

[1] Delta-9-tetrahydrocannabinol-9-carboxylic acid.
[2] Benzoylecgonine.
[3] Specimen must also contain amphetamine at a concentration greater than or equal to 200 ng/ml.
[4] Test for 6-AM when morphine concentration exceeds 2,000 ng/ml.

(D) If it is shown that the employee was impaired pursuant to subsection (b)(1)(C) at the time of the injury, there shall be a rebuttable presumption that the accident, injury, disability or death was contributed to by such impairment. The employee may overcome the presumption of contribution by clear and convincing evidence.

(E) An employee's refusal to submit to a chemical test at the request of the employer shall result in the forfeiture of benefits under the workers compensation act if the employer had sufficient cause to suspect the use of alcohol or drugs by the claimant or if the employer's policy clearly authorizes post-injury testing.

(2) The results of a chemical test shall be admissible evidence to prove impairment if the employer establishes that the testing was done under any of the following circumstances:

(A) As a result of an employer mandated drug testing policy, in place in writing prior to the date of accident or injury, requiring any worker to submit to testing for drugs or alcohol;

(B) during an autopsy or in the normal course of medical treatment for reasons related to the health and welfare of the injured worker and not at the direction of the employer;

(C) the worker, prior to the date and time of the accident or injury, gave written consent to the employer that the worker would voluntarily submit to a chemical test for drugs or alcohol following any accident or injury;

(D) the worker voluntarily agrees to submit to a chemical test for drugs or alcohol following any accident or injury; or

(E) as a result of federal or state law or a federal or state rule or regulation having the force and effect of law requiring a post-injury testing program and such required program was properly implemented at the time of testing.

> (3) Notwithstanding subsection (b)(2), the results of a chemical test performed on a sample collected by an employer shall not be admissible evidence to prove impairment unless the following conditions are met:
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> (A) The test sample was collected within a reasonable time following the accident or injury;
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> (B) the collecting and labeling of the test sample was performed by or under the supervision of a licensed health care professional;
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> (C) the test was performed by a laboratory approved by the United States department of health and human services or licensed by the department of health and environment, except that a blood sample may be tested for alcohol content by a laboratory commonly used for that purpose by state law enforcement agencies;
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> (D) the test was confirmed by gas chromatography-mass spectroscopy or other comparably reliable analytical method, except that no such confirmation is required for a blood alcohol sample;
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> (E) the foundation evidence must establish, beyond a reasonable doubt, that the test results were from the sample taken from the employee; and
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> (F) a split sample sufficient for testing shall be retained and made available to the employee within 48 hours of a positive test.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[5] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[6]

ANALYSIS

The claimant, in his application for review, alleges that the ALJ erred in allowing drug testing that did not comply with K.S.A. 2012 Supp. 44-501(b)(3). However, claimant did not file a brief with the board that would indicate in what regard the ALJ erred. This Board member has reviewed the Order and holds that the ALJ's findings comport with the evidence placed on the record.

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[5] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[6] K.S.A. 2012 Supp. 44-555c(k).

The ALJ stated in his order that K.S.A. 2012 Supp. 44-501(b)(3) does not apply because the sample was not collected by the employer. The fact that a third actually collected the sample from claimant does not relieve respondent from meeting the conditions set out in K.S.A. 2012 Supp. 44-501(b)(3).[7]

Claimant argues that the testing provided by the Clara Barton Hospital and Quest Diagnostics does not meet the requirements of K.S.A. 2012 Supp. 44-501(b)(3). This Board member disagrees. The test sample was collected within 90 minutes following the accident. The accident occurred at approximately 5:30 or 6:00 p.m. and the test was taken at 7:00 p.m.[8] This Board member finds 90 minutes to be reasonable.

The test sample was collected by an individual licensed by the American Society of Clinical Pathologists, who is also certified as a DOT specimen collector.[9] The test was performed by Quest Diagnostics. Quest is approved by the United States Department of Health and Human Services.[10] The test was confirmed by gas chromatography-mass spectroscopy.[11]

The foundation evidence establishes, beyond a reasonable doubt, that the test results were from the sample taken from the employee. Ms. Espinosa testified that she gave claimant the sample container and that he went in the bathroom and came back out with the sample.[12] Claimant testified that he gave the sample and delivered it to Ms. Espinosa, although he could not remember her name.[13] A split sample was taken by Ms. Espinosa.[14] However, the sample was never requested by claimant.[15]

Respondent has proven that the testing provided by Clara Barton Hospital and Quest Diagnostics meets all of the requirements of K.S.A. 2012 Supp. 44-501(b)(3).

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[7] *Darrell J. Jones v. Junction City Wire Harness*, Docket No. 1,059,933, 2013 WL 485708 (WCAB, Jan. 31, 2013). This was a preliminary review. The issue has not been addressed by the full board.

[8] P.H. Trans at 44, Espinosa Depo., Ex. B.

[9] Espinosa Depo., p. 5, Ex 1.

[10] Wuest Depo., p. 5.

[11] Wuest Depo., p. 13.

[12] Espinosa Depo., p. 12

[13] P.H. Trans at 24.

[14] Espinosa Depo ., p. 14.

[15] P.H. Trans at 47.

CONCLUSION

Based upon the record, test results create a conclusive presumption that claimant was impaired at the time of his injury pursuant to K.S.A. 2012 Supp. 44-501(b)(1)(C), and that claimant has failed to overcome the conclusive presumption.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Preliminary Hearing Order of Administrative Law Judge Bruce E. Moore dated April 24, 2013, is affirmed for the reasons stated above.

IT IS SO ORDERED.

Dated this _____ day of June, 2013.

_____
HONORABLE SETH G. VALERIUS
BOARD MEMBER

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